



## FEDERAL ASSESSMENTS MORE STRINGENT

A recent decision of the Supreme Court of Canada has determined that a project subject to federal environmental assessment must be assessed based on the full project as proposed not narrowed to areas of specific federal jurisdiction. It had been the practice of federal authorities, based on earlier decisions, to limit the scope of environmental assessments to those aspects specifically requiring federal approval.

The Supreme Court of Canada decision in *MiningWatch Canada* dated January 21, 2010 confirms that the federal government must proceed with an environmental assessment of a project based on the project proposed by the proponent and not as scoped by the Responsible Authority.

Under the *Canadian Environmental Assessment Act* (CEAA), there are different levels of assessment required depending on the nature of the project. Projects are assessed based one of three "tracks"- a screening, comprehensive study or referred to a mediator or review panel, the least stringent being a screening.

In 2006, Red Chris Development received approval for construction of a gold and copper mine in northern British Columbia through a joint BC and federal assessment process. Approval was given under CEAA by the Responsible Authorities (RA) (Department of Fisheries and Oceans (DFO) and Natural Resources Canada) based on a screening level assessment.

Although the Red Chris project was listed in the Comprehensive Study List Regulation (CSL), DFO scoped the project such that it only included the tailings impoundment area and water diversion system and the explosives storage and/or manufacturing facility and excluded the mine and mill. Therefore, DFO determined that a comprehensive study was not required and that the federal assessment would proceed by way of a screening.

The Court determined that a federal RA does not have the discretion to determine whether an environmental assessment proceeds by way of a screening or a comprehensive study. If the project as proposed is listed in the CSL, a comprehensive study is mandatory.

The Court held that tracking and scoping are distinct steps in the CEAA process. The RA does not have discretion as to the track. However, once the appropriate track is determined, the RA does have the discretion to determine the scope of the project for the purposes of the assessment.

As to scoping, the Court stated that the minimum scope is the project as proposed by the proponent. The RA or the Minister has the discretion to enlarge the scope when required by the facts and circumstances of the project. "It is conceivable that the project as proposed by the proponent might have only required a screening. However, when the RA or Minister considers all matters in relation to the project as proposed, the resulting scope places the project in the CSL."

*"The federal government must proceed with an environmental assessment of a project based on the project proposed by the proponent."*

In the *MiningWatch* case, the proposed project was described in the CSL and should have been reviewed by way of comprehensive study. "The RAs in this case acted without statutory authority by conducting a screening."

The Supreme Court of Canada was of the opinion that ordering that the environmental assessment be re-done was not warranted in this situation. It limited itself to declaring that the responsible authority erred in failing to conduct a comprehensive study.

This decision is of importance to proponents of projects that fall within the federal jurisdiction for assessment. Proponents will want to carefully consider how they describe the proposed project to the federal authorities. If the proposed project is listed in the CSL, a comprehensive study will be required. A comprehensive study requires additional public consultation and additional factors must be considered in the assessment process; This will accentuate the importance of coordinating the provincial and federal assessment processes to avoid unnecessary delays in the process.



The content of this Newsletter is intended to provide information on Bull, Housser & Tupper LLP, our lawyers and recent developments in the law. The information contained

herein is summary in nature, and does not constitute legal advice. For additional details or advice concerning specific situations please contact any member of our Environmental Group.

If you have any questions, please contact any member of our Environmental Group.

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